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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-622

KENNETH A. BODE, ET AL., *Petitioners,*

v.

NATIONAL DEMOCRATIC PARTY, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court and the opinion of the Court of Appeals, neither of which is yet reported, are printed in the Appendix to the petition.

JURISDICTION

The petition for a writ of certiorari was timely filed on November 5, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1964).

QUESTION PRESENTED

Whether past party voting performance is the sole permissible constitutional criterion for the allocation of delegates among the states and the District of Columbia at national political party presidential nominating conventions.

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE II

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice-President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

AMENDMENT XII

The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President,

and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; —The President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment XXIII

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Rep-

resentatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

STATEMENT OF THE CASE

On June 22, 1971 the United States District Court for the District of Columbia entered an order granting petitioners' motion for summary judgment and enjoining respondents from using the formula devised by the Democratic National Committee for allocating delegates among the States and the District of Columbia at the 1972 Democratic National convention. The order required defendants to employ an allocation formula based exclusively upon Democratic voting performance in the states and the District of Columbia in one or more recent presidential elections. On September 30, 1971 the United States Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court and directed the entry of an order granting respondents' motion for summary judgment.

STATEMENT OF FACTS

The 1968 Democratic National Convention charted a course of massive internal political reform for the Democratic Party. The convention adopted resolutions creating two commissions to study and overhaul the entire structure of the party. One of these, the Commission on Party Structure and Delegate Selection, under the chairmanship of Senator George Mc-

Govern, was given the task of reforming the methods by which delegates are selected within each of the states to attend the national presidential nominating convention.[1] The other, the Rules Commission of the Democratic National Committee, under the chairmanship of Congressman James G. O'Hara, was given the task of overhauling the procedures of the convention. One of its main assignments was to recommend to the Democratic National Committee a new formula for allocating delegates to the national convention among the states, the District of Columbia, Puerto Rico and the Territories (Canal Zone, Guam and the Virgin Islands), to replace the patchwork system of "victory bonus votes" and other devices on which delegate allocation had been predicated in the past.

The O'Hara Commission met throughout 1969 and 1970 in numerous cities around the country and solicited the views of all interested Democrats. The commission considered numerous possible allocation methods recommended by participants at its hearings. Following these extensive hearings, the commission met twice for lengthy working sessions in Washington, D. C. In its February 1971 report on delegate allocation to the Democratic National Committee, the O'Hara Commission recommended that:

—There be 3,000 delegates allocated among the states and the District of Columbia at the 1972 Convention;

—1,500 of them be allocated on the basis of population and 1,500 on the basis of the average Demo-

[1] The recommendations of the McGovern Commission for rules to open up the delegate selection process to all interested Democrats and to ensure procedural fairness were adopted by the Democratic National Committee and appended to the Call for the 1972 Convention.

cratic voting strength in the past three presidential elections;[2] and

—No recommendation was made with respect to the traditional voting representation of Democrats in Puerto Rico and the Territories.

The recommendations of the O'Hara Commission were considered first by the Executive Committee of the Democratic National Committee. The Executive Committee recommended that the O'Hara formula be modified as follows:

—Three thousand delegates would still be divided among the states and the District of Columbia.

—However, 1,614 of them (roughly 54 percent) would be apportioned on the basis of electoral college strength. Each state and the District of Columbia would receive three delegate votes for each electoral college vote it would possess in the 1972 election.

—The remaining 1,386 delegates (roughly 46 percent) would be allocated on the basis of average Democratic voting strength in the past three presidential elections.[3]

—The traditional voting representation of Puerto Rico and the Territories would be continued with seven votes for Puerto Rico and three each for the Virgin Islands, Guam and the Canal Zone.

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[2] Appropriate mathematical adjustments were made to reflect the facts that citizens of the District of Columbia were not allowed to vote in the 1960 presidential election and that citizens of Alabama were not given the opportunity in 1964 to vote for the nominee of the Democratic Party.

[3] Once again, adjustment was made for the disfranchisement of the District of Columbia in 1960 and the inability of Alabama citizens to vote for the Democratic nominee in 1964.

On February 19, 1971, the full Democratic National Committee met in an all-day session to adopt a delegate allocation formula for the 1972 presidential nominating convention. In addition to the O'Hara and Executive Committee proposals, five other formulas for allocating delegates among the states were put forward by individual committeemen and voted upon. Those other formulas were: (1) allocation of all delegates on the sole basis of population; (2) allocation of all delegates on the sole basis of past voting performance; (3) allocation of all delegates on the basis of a multiple of each State's electoral college votes; (4) a modification of the O'Hara proposal under which no State or Territory would receive less than ten votes; (5) allocation of the delegates, 50 percent on the basis of past voting performance, 25 percent on the basis of population and 25 percent on the basis of electoral college votes. Each of these proposals included delegate votes for Puerto Rico and the Territories. At each stage of the debate there was unanimous accord that Democrats residing in these areas should continue to receive voting representation, which they have enjoyed at every Democratic convention since 1880. Full opportunity for discussion and debate was allowed.[4] The full Committee ultimately adopted the Executive Committee proposal.

Following adoption of the 1972 delegate allocation formula by the Democratic National Committee, the petitioners brought the present action, seeking a declaration that that formula violated the equal protection clause of the fourteenth amendment to the United States Constitution. Despite the fact that no national

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[4] See Transcript of Democratic National Committee Meeting, February 19, 1971 [hereinafter cited as DNC Transcript].

convention of any major political party has ever been apportioned on such a basis, the petitioners insisted that the equal protection clause had all along dictated that the sole constitutionally acceptable allocation formula is one based exclusively on party voting performance in previous presidential elections. They argued that there was no room for the play of political compromise and adjustment at the heart of the political process—that a party could not cultivate its future prospects as well as reward its past glories in distributing power within its councils—that the presidential nominating process could not take into account the method by which a President is chosen under our Constitution in dividing strength among the states. In a rhetorical effort to come within the rationale of this Court's "one-man, one-vote" legislative reapportionment decisions, they dubbed their proposal "one-Democrat, one-vote."

The respondents opposed petitioners' motion for summary judgment and filed motions to dismiss and for summary judgment of their own. They urged that the claim advanced by plaintiffs did not give rise to a justiciable case or controversy within the meaning of article III of the federal constitution, and that even if it did, the delegate allocation formula adopted by the Democratic National Committee (1) had a clear rational basis in its attempt to express the relationship between the constitutionally mandated electoral college process for electing a President and the traditional sources of Party strength; and (2) did not work any invidious discrimination against any element of the Party.

Since there was virtually no dispute as to the underlying facts, the matter was argued and submitted on

cross-motions for summary judgment. At the close of oral argument on June 16, 1971, Judge June L. Green announced from the bench that respondents' motion for summary judgment was denied and petitioners' motion was granted. Judge Green simply stated that she found the matter "justiciable" and that the allocation formula of the Democratic National Committee was "discriminatory" and lacked a "rational basis." (Tr. 42)[5] With no amplification of the reasoning underlying the conclusions she had reached on these questions of constitutional law, Judge Green merely asked counsel to submit "an order." (Tr. 42) No opinion was ever filed by the Court, but in an effort to shore up the Judge's totally unexplained action, counsel for petitioners actually submitted proposed findings of fact and conclusions of law and an order. Judge Green signed these as submitted without a single change to reflect the thinking or even the attention of the Court.[6]

The Court of Appeals in a unanimous opinion agreed with Judge Green that the subject matter of the lawsuit presented a justiciable case or controversy.[7] The

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[5] Citations to (Tr. —) are to the transcript of the hearing in District Court on June 16, 1971.

[6] This practice has repeatedly been condemned by this Court as an abdication of the judicial function. See, *e.g.*, *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964); *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 184-85 (1944).

[7] Respondents do not concede the correctness of this holding by the two courts below. Consideration of the point by this Court is unnecessary at this stage if, as respondents believe, the decision below is in any event correct for the reasons given by the Court of Appeals. However, respondents reserve the right to argue the question of justiciability in the event the Court decides to grant the writ of certiorari. See *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 560 (1931); *Langnes* v. *Green*, 282 U.S. 531 (1931).

Court, however, concluded that there was no arbitrary discrimination inherent in respondents' formula and that it was clearly rationally related to the constitutionally mandated electoral college method of choosing a President and to the legitimate organizational functions of a national political party. The Court also held that the Constitution did not limit a political party to the single factor of past presidential voting performance in allocating delegates to its national convention.

REASONS TO DENY THE WRIT

The decision below is plainly correct and there is no occasion for further review by this Court.

1. The allocation formula adopted by the Democratic National Committee is plainly rationally related to the goals and functions of a national political party presidential nominating convention. The function of such a convention is to select the party's nominees for the general election. Perhaps uppermost in importance in structuring this selection process is to allow room for the party to ensure the selection of nominees with a realistic chance to win. The Constitution requires the President to be selected through the electoral college. The electoral college method of choosing a President grew out of the great compromise which allowed the original thirteen states to agree upon a constitutional form of union. Like the bi-cameral legislature, it represented a deliberate balance between pure majoritarian interests and the need for recognition of the interests of the smaller states.

It is obviously rational for a major national political party to take account of the electoral college strength of the various states in allocating the dele-

gates to its presidential nominating convention. Indeed, historically both major parties, until well into the twentieth century, based their allocation formulas exclusively upon the electoral college.[8] If individual states or groups of states are not given a voice in the choice of a nominee and the articulation of a platform which is roughly commensurate with their relative strength in the ultimate choice of the President, the party runs the risk of ignoring the interests of those states to its ultimate detriment in the final election process.

Moreover, because of the electoral college system of choosing a President, the election campaign is really conducted in essence on a state-by-state basis, with each state's total of electoral votes a separate prize. The organization and morale of the party's adherents in each state is thus a matter of legitimate concern to the party in the distribution of strength within its councils.[9] Thus, the first major element of

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[8] See P. David, R. Goldman and R. Bain, *The Politics of National Party Conventions* 164 (1960).

[9] The concern for party morale in the small states if their interests were ignored in the allocation of delegates was expressed by a number of speakers from those states at the February 19 meeting at which the Democratic National Committee settled upon the present formula. It was noted by Congresswoman Patsy Mink that the O'Hara formula reduced Hawaii, a State carried by the Democrats in 1968, from twenty-six votes in 1968 to eleven in 1972, and that this underrepresented Hawaii in terms of its actual power in the election. DNC Transcript 128-29. Moreover, National Committeeman Joseph Doorley of Rhode Island objected that five of the thirteen states carried by Vice President Humphrey in 1968 would be rewarded by having their strength at the 1972 convention drastically reduced under the O'Hara proposal. *Id.* at 131-32. The effect upon these states would be even more drastic under petitioners' formula.

the Democratic National Committee's delegate allocation formula—the apportionment of roughly 50 percent of the delegates on the basis of electoral college strength—is rationally related to the twin goals of electoral success and party organization and morale.

There are other important factors which a party may legitimately take into account in distributing delegates among the states. Thus the second major element of the Democratic National Committee's formula —the allocation of roughly 50 percent of the delegates on the basis of past party voting performance in presidential elections—provides a vital element of realism in the nomination process.

History has shown that an apportionment formula which takes no account of the uneven distribution of party strength throughout the nation produces gross distortions in the make-up of the convention and may lead to disastrous results at the polls for the party nominee. The clearest example is provided by the election of 1912, in which the reelection bid of President William Howard Taft was smashingly defeated because the southern delegate strength which had held the nomination for him could not be translated into electoral votes because of the complete disintegration of the Republican Party in the South following Reconstruction.[10] Past presidential voting performance, of course, is at best only a rough indicator of the sources of traditional party strength and presumably of the present and future voting power of the party. As such it is one of many potential useful indicators

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[10] See P. David, R. Goldman, and R. Bain, *supra*, note 8 at 166-67.

of distribution of party strength to which a party may rationally look in structuring itself internally.[11]

The third element of the Democratic National Committee's formula—the allocation of sixteen votes to the Commonwealth of Puerto Rico and the Territories of the Canal Zone, Guam and the Virgin Islands—serves the important interest of giving representation to American citizens in those areas in the choice of a presidential nominee and in the articulation of the party's positions. It also accords with longstanding tradition in both major parties. The territories and the District of Columbia have had voting representation at every Democratic convention since 1880. Though their petition for certiorari does not deal with the subject, petitioners have admitted at every stage of the proceedings that their view of the constitutional commands in this area requires the disfranchisement of Democrats residing in Puerto Rico and the Territories at the party's National Convention. Citizens in these areas, however, have a vital interest in the presidential nominating and platform writing processes. Even though they have no vote in the final presidential election, the President of the United States is their chief executive, he heads the government which controls their destinies, they pay taxes to the United States Government, and they are subject to conscription into the armed forces. It is not too much to suggest that voting representation at presidential nominating conventions for Alaska and Hawaii played a role in their achievement of statehood and

[11] Other indicators of party strength for which a rational case might be made would include, for example, past party congressional voting performance, the distribution of governorships nationwide, or even public opinion polls.

that similar representation for the District of Columbia may have led in part to the passage of the twenty-third amendment, giving a presidential vote to residents of the District. The notion that the Constitution of the United States precludes the Democratic Party from giving a voice at its convention to those who will be vitally affected by the decisions of that body and its nominees, where that voice represents their only opportunity to affect the political processes of the government which controls their destinies, is plainly nonsense.

Thus all three elements of the Democratic National Committee's formula are rationally related to legitimate goals and interests of a major national political party. There may be other such legitimate factors, but it is vital to the functioning of our system of government that there remain at the heart of the political process a zone of constitutionally protected compromise for the balance of various interests in the structuring of our major parties. The Democratic National Committee's formula plainly represents a rational balance of legitimate factors, and it is not even claimed that it is invidiously discriminatory against any identifiable group within the party, such as Blacks, women or young people.[12]

2. The only claim of discrimination made by petitioners is that the Democratic National Committee's formula departs from their past voting performance

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[12] Indeed, the Democratic Party has insisted at every stage that the party's processes be open to all Democrats without discrimination on the basis of race, religion, sex or age. See generally, *Mandate for Reform: A Report of the Commission on Party Structure and Delegate Selection to the Democratic National Committee* (1970).

standard, which they claim is mandated by the equal protection clause. They have predicated their case upon a rhetorical analogy to this Court's legislative reapportionment decisions, by calling their formula "one-Democrat, one-vote."

The analogy to the legislative reapportionment cases breaks down at a number of points. First of all, petitioners' proposed approach ignores the constitutionally mandated method of selecting a President—through the electoral college. And as we have already seen, it fails to take account of the nonrepresentational functions of a national political party convention—the selection of a candidate *who can be* elected and the preservation of party morale and organization for the election effort.

Even if we assume, however, that a presidential nominating convention is a representative body in precisely the same way that a legislature is, petitioners have made erroneous assumptions concerning the nature of the convention's constituency. As the Court below pointed out:

> the constituency represented at a national convention does not comprise solely 'Democrats,' so defined. To the extent that a voter, whether he be a registered Democrat or Republican, third party adherent or independent, is given alternative slates by the two major parties, he has a stake in the outcome of the nominating process of both parties. Accordingly, the constituency for a national convention comprises to a certain degree the entire electorate. By viewing the constituency of the Democratic National Convention in this way, the application of appellees' theory —that the allocation of delegates must be based on past performance—could theoretically result in

> a failure to represent, or at best, in an under-representation, of those who might wish to nominate and vote for a nominee different from the one ultimately selected at the convention.

Petition Appendix 35-36.

Even if we make petitioners' second assumption, however—that the sole constituency legitimately represented at a national party nominating convention of the Democratic Party is "Democrats"—their proposed formula is at once so lacking in definitional certainty and so devoid of political flexibility that it is utterly inappropriate to be graven in constitutional stone. The legislative reapportionment decisions in this Court proceed upon the notion that it is always at least theoretically possible to count the number of potential voters in a given constituency and to divide representatives in a republican body among that constituency on a basis of mathematical equality. But the concept of a "Democrat," unlike that of a potential "voter," is not a constant. A man or a woman becomes a potential "voter" at the age of 18 and, with limited exceptions, remains such until he or she dies. His or her location at any given moment may be ascertained and taken into account in apportioning a legislature. But being a "Democrat" is a state of mind, which can and does change from election to election and indeed within a single election campaign. A person may vote Democratic in 1964, Republican in 1968, and Independent in 1972. Or he may support a particular candidate within either major party for the party nomination, and change party allegiance before the election if his candidate is not chosen. Political allegiances shift so rapidly in our society, particularly in election years, that we are

able to support a large number of political pollsters, whose main function is to tell us how many "Democrats" there are from week to week.

There is, moreover, a serious problem of how to define a "Democrat." There is no *a priori* reason why one who works within the party's ranks at the local and state level but who has on one or more occasions deserted the party's presidential nominee, should be denied representation in the choice of the next standard bearer. Thus the concept of past party voting performance is *at best* what the Democratic Party's formula uses it for—a rough indicator of party strength to be taken into account in allocating delegates. It is not a formula susceptible of being written into the Constitution.

There is yet a further difficulty with petitioners' formula. It is perhaps ironic that petitioners should seek to impose as constitutionally required in 1972 a formula which prohibits a party from taking any account of the 25 million new potential voters which the passage of time and the twenty-sixth amendment will make eligible to vote in that year's election. Petitioners' formula would freeze the delegate allocation process in a backward-looking and already outmoded posture at a time when the infusion of new blood into our country's political processes may have a more important impact than at any time in our history. The electoral college element of the Democratic National Committee's formula permits at least some account to be taken of the distribution and representation of these potential new voters. Petitioners' formula, on the other hand, would preclude a party from cultivating its prospects among new voters or other new potential sources of strength through the distri-

bution of power at its convention. The failure of petitioners' formula in this respect is another striking reason why it is inappropriate as the sole constitutional criterion.

3. In an effort to promote this case as worthy of this Court's attention, petitioners have claimed that there is a conflict between the decision of the Court of Appeals in this case and its earlier decision in *Georgia* v. *National Democratic Party,* No. 71-1018, D.C. Cir., *cert. denied,* 40 U.S.L.W. 3165 (U.S. Oct. 12, 1971) (No. 71-272). See Petition at 13-16. This attempt is absurd.

The issue in *Georgia* was whether the Constitution *required* delegates to be allocated solely on the basis of population. Like the petitioners in this case, the plaintiffs in *Georgia* relied exclusively upon this Court's legislative reapportionment decisions. The Court of Appeals noted that in view of the uneven distribution of party strength nationwide, the "imposition of a population-based criterion would constitute a departure from the *equal representation* standard underlying the reapportionment cases." Slip Opinion at 14. In this case the Court of Appeals also rejected reliance upon the legislative reapportionment decisions, noting that the constituency of a national party presidential nominating convention cannot properly be said to be limited exclusively to those who voted for the party nominee in one or more past presidential elections. It held that "the constituency for a national convention comprises to a certain degree the entire electorate." Pet. App. at 36.

There is plainly no inconsistency between these two holdings. To say that a party convention departs

from equal representation if it ignores the uneven distribution of party strength is not to say that the party's constituency is confined to its past adherents. Indeed, the party's role in the election is to appeal to a wider segment of the population and to garner votes from those who are uncommitted or who have in the past supported the opposition party. In some sense the allocation formula of any national party convention constitutes an effort to express the relationship between these two shifting constituencies in the manner most likely to promote the party's goal of electoral success. The Democratic National Committee's formula seeks to express that relationship as a function of the constitutionally mandated electoral college method of choosing a President and the past presidential voting performance of the states as a rough measure of the distribution of party strength. Petitioners have not suggested any reason why the expression of this relationship in these terms is in any manner irrational or discriminatory against any element within the party, or why it conflicts with the decisions of this Court on legislative reapportionment or any other subject.

4. The timing of this case with respect to the election may be an important factor in this Court's consideration of the petition. The 1972 Democratic National Convention is scheduled to begin on July 9, 1972. The process of selecting delegates under the various applicable state laws begins in the first half of January. The entire political process in a presidential election year will be seriously disrupted if the number of delegates allocated to each state is not finally settled by that time.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: December 6, 1971